NO. 2630.

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

FIREMAN'S FUND INSURANCE COMPANY (a corporation,

Appellant,

vs.

GLOBE NAVIGATION COMPANY (a corporation) and S. P. WESTON, as trustee in Bankruptcy of the GLOBE NAVIGATION COMPANY (a corporation), Bankrupt,

Appellees.

BRIEF FOR APPELLEES.

CLISE & POE,

Proctors for Respondent.

New York Block, Seattle, Washington.

Filed this .... day of October, 1915.

FRANK D. MONCKTON, Clerk.

By .... Deputy Clerk.

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The Globe Navigation Company, on the 3rd day of June, 1911, at Seattle, Washington, chartered the American schooner "Wm. Nottingham" to W. R. Grace & Co. for a voyage from Westport, Oregon, to Callao, Peru. A copy of the charter party appears in the record as respondent's Exhibit A. In pursuance of the terms of this charter party the vessel was loaded and was ready to sail the latter part of Sep-

tember, 1911. The master of the schooner then came to Seattle, the home port of the schooner "Wm. Nottingham", and as directed by Mr. Thorndyke (tr. p. 57) applied to the offices of W. R. Grace & Co. in Seattle for a certain sum of money in accordance with the provisions of the charter party, which reads as follows:

> "A sufficient amount for ship's ordinary disbursements at the port of loading, same not exceeding one-third of the freight, to be advanced by charterers, if required by captain, on account of freight under this charter party, subject to a charge of seven per cent to cover interest, insurance and commission; advance to be endorsed on captain's copy of charter party and all bills of lading."

W. R. Grace & Co. were willing to pay the above sum of money, but instead of endorsing it on the captain's copy of the charter party and all the bills of lading, required the captain to sign a receipt therefor, which receipt is the instrument in writing upon which libelant sued. It appears that W. R. Grace & Co. had a certain iron-clad regulation which required that a captain desiring an advance similar to the one the captain of the schooner "Wm. Nottingham" asked for, should sign this particular form of receipt or else he could not get the money (tr. p. 35) and, consequently, the captain signed this particular receipt and obtained the money and turned it over to his company, but did not tell his company that he had

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done anything of the kind (tr. p. 57). Immediately after the charter party was entered into and on June 5th, 1911 (tr. p. 27) W. R. Grace & Co. took out what is called a "covering note" against this insurance to protect themselves against any loss which they might incur by reason of having to pay this advance on account of freight. The agent of the Fireman's Fund who gave this covering note didn't take the trouble to inquire whether it was an advance on freight or an advance against the captain's draft, as he said it made little difference to them (tr. p. 26). After the advance was actually made, W. R. Grace & Co. reported the exact amount of the same to the Fireman's Fund and they then issued a policy of insurance for which they charged and received the regular premium for a risk of that kind.

The charter party provides that W. R. Grace & Co. shall charge the amount of this premium (together with interest and commission) to the Globe Navigation Company, which they did by deducting it from the amount of the advance.

The Trial Court in its opinion says:

> "There is no testimony before the Court upon which to predicate a finding that the insurance was obtained for the respondent."

Through some inadvertence, the Trial Court must have overlooked the uncontradicted testimony

of Mr. Ford on page 29 of the transcript, where he testifies as follows:

> Q. In placing this insurance for whom were you acting?
>
> A. We were acting for the Globe Navigation Company, to whom we charged and collected the amount of the premium.
>
> Q. What do you mean by saying that you were acting for the Globe Navigation Company?
>
> A. We chartered this vessel and agreed to pay a certain amount of freight for her; at the same time we agreed to make a certain amount of advance against the freight, which we did; the advance we insured, and in so doing we practically stepped into the position of the Globe Navigation Company in insuring our own freight, with the understanding that if they insured the freight they would not insure more than the balance over the amount of this indebtedness."

Mr. Ford testified (tr. p. 27) that he was the submanager of W. R. Grace & Co., stationed at Seattle, in June, 1911, and signed the charter party referred to on behalf of W. R. Grace & Co.

Our contention is simply this: That he obtained this advance on account of freight under and in accordance with the terms of the charter party, and the captain, when he was sent to collect the same at the home port of the vessel and the respondent, was simply a messenger boy, with no more authority than a messenger boy, to collect this money, which he did;

and if, in order to get it, he signed an instrument as a receipt therefor which attempted to change the provisions of the charter party, but which it was not the intention of anyone that it should, he simply acted without authority. That we having paid the premium of the insurance company through our agents W. R. Grace & Co. to protect ourselves if the vessel should meet with any disaster, we should have the protection for which we paid. The insurance company desires to be placed in a position, first, where it could get the premium from us and then wants to be made whole against the very loss for which we were paying for protection; in other words, the insurance company is playing the game of "Heads I win, and tails you lose", because if its position is correct, it couldn't lose.

The Insurance Company did not know anything of the captain's receipt or draft in June, when it issued the coverning notes because it was not then in existence or in October, when it issued the policy. It simply knew it was insuring an advance on account of freight paid on a contemplated voyage of the schooner "Wm. Nottingham." The first it knew of the instrument they sue on was after it had paid the cash and (tr. p. 19) when it read the receipt, in the peculiar form it was drawn, hoped it might get the money back and brought suit.

ARGUMENT.

I.

Libelant based their action on the instrument in writing given by the captain in Seattle on September 27, 1911. It clearly appears from the records and testimony in this case that the vessel was loading lumber at Westport, Oregon, and the captain went from there to Seattle, where he was under immediate control of Mr. Thorndyke, the manager of the Globe Navigation Company. As the libelant did not write their insurance based upon this written instrument and did not know of its existence until after the loss occurred, and as it appears from its face that it was executed at Seattle, the home port of the respondent, they were charged with notice that the captain had no authority to give such an instrument.

> "***The ordinary rule was stated by Lord Abinger in the case of Arthur v. Barton, in the following terms, (1840) 6 M. & W. 138; 9 L. J. Ex. (N. S.) 187. 'Under the general authority which the master of a ship has, he may make contracts, and do all things necessary for the due and proper prosecution of the voyage in which the ship is engaged. But this authority does not usually extend to cases where the owner can himself personally interfere, as in the home port, or in a port in which he has beforehand appointed an agent, who can personally interfere to do the thing required. Therefore, if the owner or his personal agent be at the port, or so near to it as to be reasonably expected to interfere personally,

> the master cannot, unless specially authorized, or unless there be some usual custom of trade warranting it, pledge the owner's credit at all, but must leave it to him or his agent to do what is necessary.'"

Abbott on Law of Shipping, p. 173.

Thus it is well settled that where the owner is himself present or within easy access, that agency of the master which is founded on necessity disappars, for the necessity ceases to exist. No necessity can be sufficient if the owner be so near that the master is not obliged to act without instructions.

Botsford v. Plummer, 34 N. W. 572.
I Pars. Mar. Law, 380.
Jordan v. Young, 37 Me. 276.
Pentz v. Clarke, 41 Md. 327.
The Tribune, 3 Sum. 149.
The C. N. Titus, 7 Fed. 826.

> "The principles regulating the authority of the master with regard to the employment of the ship, subject to some statutory alterations dealing with procedure, and with the limitation of the responsibility of shipowners, have not been in any way altered since Lord Tenterden wrote. This may be seen by comparing the foregoing with the judgment of the Court of Common Please in the case of Grant v. Norway, (1851) 20 L. J. C. P. 93, delivered by Lord Chief Justice Jarvis, who stated tersely the master's position as follows: 'The authority of the master of a ship is very large, and extends to all acts that are usual and necessary for the use and employment of the ship, but

is subject to several well-known limitations. He may make contracts for the hire of the ship, but cannot vary that which the owner has made.**' "

Abbott on Law of Shipping, p. 159.

Captains or agents, even at foreign ports, have no authority to vary a charter without express instructions from their principal.

Scrutton's Charter Parties and Bills of Lading, 5th Ed., 36.

The respondent denies liability upon this written instrument not only because the master had no authority to give it and it was therefore void, but also because there was no consideration whatsoever for the same, and we have heretofore pointed out that our contention is supported by ample testimony. The charter party was the basis for our right to demand the payment of this money. It was not a voluntary contribution on behalf of W. R. Grace & Co., but was a simple fulfillment of the terms of the written agreement under which the ship was chartered to them. They made themselves whole against any possible loss by reason of this advance to us by not only charging us interest on the money for the contemplated time the voyage would take, but also a commission for making the advance and a sum sufficient to pay the premium upon the policy of insurance which they had negotiated with libelant by procur-

ing the covering note in June, 1911. (tr. p. 44). Mr. Thorndyke, the manager of the Globe Navigation Company, testified (tr. p. 45) that he never saw one of these drafts until after the disaster to the "Wm. Nottingham" occurred, and a dilignt search of the files of his office produced only one other similar draft; it is true Mr. Ford says that others were executed by captains of other schooners belonging to the Globe Navigation Company, but there is no proof that such drafts were ever returned to the home office, and, in view of Mr. Ford's testimony, it undoubtedly was their custom to take these drafts simply as receipts and file them away in the same way that an ordinary receipt is filed for money paid.

When the charter party was entered into the Globe Navigation Company, on its part, agreed to load on board the schooner "Wm. Nottingham", a certain amount of lumber and deliver the same as directed by charters at Callao or Valparaiso, and in consideration thereof, W. R. Grace & Co. agreed to pay the Globe Company a certain stipulated sum, a part thereof, on the right and full delivery of the cargo, and the remainder, not exceeding one-third of the full freight, for ship's ordinary disbursements at port of loading, when the schooner was ready to sail.

It is just as much a part of the consideration that

a part of the freight should be paid before the schooner sailed as that the remainder should be paid when the cargo was delivered. The mere fact that the money was worth insurance, commission and interest to us, does not alter the circumstances which induced us to make the charter party. That we paid the insurance, however, is very material, because it shows it was our insurance. What benefit would it be to us to have this insurance, if in case of loss, we had to return the money? If such were the case, would it not have been better for us not to have taken out any insurance and saved paying the premium? In view of this state of facts, is it reasonable to say that, for no reason at all, the captain could or intended to change the original agreement?

II.

We must look to the charter party executed between the respondent and W. R. Grace & Co. early in June, 1911, to determine what was in the minds of the parties to the charter party when they executed the same and also as to what risk the libelant was assuming when they issued the note covering the advance which W. R. Grace & Co. expected to make to the respondent prior to the sailing of the schoner

with her cargo on board. Taking into consideration the terms of the charter party, there is little or no difference between the English law and the American law concerning advances made on account of freight.

The English law appear to be as follows:

In *Allison v. Bristol Mar. Ins. Co.,* 1 App. Cas. 209, this rule of the English law was unanimously recognized in the House of Lords. Lord Penzance said, at page 244:

> "But then, it is said, a payment of freight in advance cannot be recovered back if the goods do not arrive; and that this has been held for good law in successive cases. This, at least, shows that such an advance is not unfamiliar, either to the commercial community or the courts of law; and as to the injustice of it, the provisions of the present charter party show how easily and simply any injustice is practically avoided. An advance of freight is nothing more than an arrangement for the convenience of the shipowner who wants an advance, and, if the merchant will make it, is willing to pay the cost of insuring the advance when made, this practically taking upon himself in another form the risk, which properly belongs to him, of the freight never being earned at all."

Hicks v. Shield, 26 L. J. Q. B. 205; 7 E. B. 633.

Allison v. Bristol Mar. Ins. Co., 1 App. Cas. 209-234.

Abbott on the Law of Shipping, pp. 666 and 640.

"The arrangement amounts to this, that the shipowner in consideration of the covenience of having the freight advanced, is willing to bear the cost of insuring that advance. That cost is therefore allowed, or returned, to the merchant out of the advance when he makes it. And the shipowner thus, in effect, bears the risk (represented by the cost of insurance) of the freight not being earned."

J. Smith v. Pyman, 1 Q. B. 42.

Carver's Carriage by Sea (3rd Ed.), p. 642.

The rule as announced by the American courts is that money paid in advance on account of freight is to be returned if the voyage is not completed and the cargo delivered, unless there is a special agreement to the contrary. In the case at issue, there is such special agreement to the contrary imposed in the charter party itself, and each of the authorities cited by counsel for libelant specially make note of it.

The court in the *Burn Line* case, 162 Fed. 298, says:

"Indeed, they would have to re-pay to the charterer the first installment, but for the fact, which the charterer admits would be a defense, viz.. that they paid for its insurance."

This authority, is specially in line because it ap-

pears by the uncontradicted testimony (tr. p. 44) that we paid insurance.

In the *DeSoto* case, 119 Fed. 373, the above principle is not questioned if supported by the proper proof.

And in the Massachusetts case, 9 Allen, 314, the court holds this rule (the only one contended for by libelant) may be varied or annulled by an express agreement in the charter party.

In The Potomic, 105 U. S. 630, there was no special agreement and the insurers were reimbursed, but only in the amount for which they had paid.

In The Kimball, 18 L. Ed. 50, the Court expressly says: "And there was no such special agreement in this case."

To the same effect are all the other authorities cited by libelant. It is the substance of the understanding, and not the form of words that they use, that creates the liability.

Raymond v. Tyson, 58 U. S. (17 How.), 53.

What difference does it make whether the Globe Navigation Company itself insures the advance on account of freight, which it had a right to do, or has W. R. Grace & Co. do so and has them chage the premium therefor to the Globe Co.?

III.

Appellant's third contention is that under its prayer for general relief it was entitled to recover notwithstanding that it did not prove the cause of action it alleged in its pleadings or proved that it was entitled to the express relief prayed for, but because it proved, it claims, another cause of action it could have had against respondents. The authorities cited by libelant do not, we believe, support its contention.

In the *Sonsmith* case, 21 Fed. 673, the relief granted was less than that prayed for but included therein. The libelant was mistaken only in the principles of law applicable to the loss which he alleged and proved, and the proof necessary to obtain the relief asked for and what the Court granted were the same, and the words quoted by counsel were used by the Court as applicable to that case only, and did not mean you could sue on one cause of action and prove another.

There is a wide difference between mistake in asking the proper relief and a total variance between the cause of action alleged and the proof.

In the *Panhallow* case, 3 Dall. 54, 1 L. Ed. 507, the report of which is very long, PATTERSON, J. says:

"The pleadings consist of a heap of mater-

> ials thrown together in an irregular manner, and if examined by the strict rules of common law, cannot stand the test of legal criticism."

But concludes that from the "medley of procedure" it is possible to determine what was in controversy between the parties and to grant the proper relief.

In the *Prudence*, 204 Fed. 66, immediately preceding the quotation contained in libelant's brief, the Court says:

> "The rules of pleading in admiralty do not require all the technical precision and accuracy which is necessary in the practice of common law. They do demand that the cause of action shall be plainly and explicitly set forth in clear and intelligible language, so that the adverse party may understand what is the precise charge which he is required to answer and make up issue directly upon that charge."

Consequently, whatever follows is governed by the above quotation, and clearly the Court did not intend that a libelant could plead one state of facts and recover upon another which was absolutely inconsistent from the one upon which he sued.

In the case of *Syracuse*, 12 Ball 167, there was only one cause of action alleged and proved. The only variance was between an antecedent fact growing out of the same cause of action and the recovery was not based upon any other cause of action than

that alleged. And the same is true as to the two other cases cited in support of the principles announced in the Syracuse case.

We do not believe that the cases cited by libelant announce the rule of law that there can be a total variance between the allegations and the proof, but we believe the true rule to be that when a suit is brought in an admiralty court, it must clearly state the grounds upon which a recovery is asked, so that the defendant may know what he is called upon to answer, and we think each of the cases so cited clearly announces the rule we contend for, and we will call your attention to the following additional authorities:

In *Barber v. Lockwood,* 134 Fed. 985, the Court says:

> "The law is clear that defendants' testimony must accord with the articles of the answer, just as the libelant's testimony must follow the articles of the libelant. The parties make up the issue, and must stand by them until the end. *Mc Kinley et al. v. Morrish,* 21 How. 343, 16 L. Ed. 100."

> "A libelant cannot recover upon another ground than that upon which he has chosen to place his action in the pleadings."

> "But in the first place, to permit a libelant to recover upon this ground would be a departure from that upon which they had chosen to place their right of action in the pleadings."

Rich v. Lambert, 12 How, 347; 13 L. Ed. 1017.

Here the variance is not merely immaterial but amounts to an absolute departure and total failure of proof.

IV.

Counsel for libelant seems to think that in our answer where we use the words "that one-third of the freight would be advanced and paid by charterers on account of the freight under said charter party" we have made some concession.

Arnould in his Law of Marine Insurance, 7th Ed., at Sec. 233, says:

> "The charterer may insure advance freight —i. e., money advanced by him to the shipowner under their agreement as part payment of the freight—specifically, e. g., as 'advances on account of freight'; the reason being that several eminent judges have said that such a payment is not freight (which is not earned until the goods are delivered), but money paid for taking the goods on board and undertaking to carry them (q). Arnould, however, thought that the charterer could insure advanced freight *eo nomine* as freight, though it might be safer to insure it specifically; and his opinion is supported by high judicial authority (r)."

We quote again from Arnould, at the bottom of age 295, where he says:

"Lord Campbell, delivering the judgment of the Court, said: 'There seems to be no reason why the money advanced may not be insured as freight, as well as the money to grow due on the charter, which is undoubtedly insurable as freight, although not properly freight, and rather the price of the hire of the ship. Nor do we see how we can be called uon to infer that the expression 'money advanced on account of freight' necessarily indicates that the insurance is effected by the shipper, and that the freight paid in advance is at his risk and not at the risk of the owner."

And again at Sec. 266.

"On the other hand, where the freight intended to be insured is the price of the hire of the ship under a charter party, the cases show that the inchoate rights to such freight vests in the shipowner directly the ship has broken ground on the voyage described in the charter party; from that moment nothing can intercept the earning of freight under the terms of the charter party, except the breaking up of the voyage by the perils insured against; and, consequently, from that moment the shipowner has an insurable interest in the freight, which but for the intervention of such perils he has thus put himself in a position to earn.

The shipowner has an insurable interest in the profit he expects to make by carrying his own goods in his own ship, and this interest he may protect by a general policy on the freight."

Scruton on Charter Parties, at Art. 137, says:

"Where money is to be paid by the shipper to the shipowner before the delivery of goods for ship's disbursements or otherwise, such pay-

ment will be treated as an advance of freight, or as a loan, according to the intention of the parties as expresed in the documents. The stipulation that it shall be paid 'subject to insurance' or 'less insurance' will indicate that payment is in advance of freight."

From what has already been said, the Court undoubtedly clearly understands respondent's position, that is, that the rights and liabilities of the parties to this action and of W. R. Grace & Co. are fixed and determined by the chaiter party entered into between this respondent and W. R. Grace & Co.

When the charter party provided that "A sufficient amount for ship's order disbursements at port of loading, say not exceeding one-third of the freight, to be advanced by charterers, if required by captain, on account of freight under this charter party, *supject to a charge of 7 per cent to cover any insurance and commission advanced,* to be endorsed on the captain's copy of charter party and all bills of lading", there was an express agreement entered into that W. R. Grace & Co. should make this advance on account of freight and charge the cost of insuring the same to us. That being so, if a loss occurred W. R. Grace & Co. could not recover from us, but could recover from the insurance company, and the insurance company could not recover with both hands,—that is, they could not get the premium for

insuring the loss through W. R. Grace & Co. and, in case of loss, could not recover the very amount which we had insured and for which we have paid them a premium. This very question has been expressly passed upon by the Supreme Court of the United States as follows:

> "***The contract of the carrier may not be first in order of time, but it is first and principal in ultimate liability."

> "But it is equally well settled that the right by way of subrogation of an insurer upon paying for a total loss of the goods insured to recover over against the carrier, is only that right which the assured has, and that accordingly when a bill of lading provides that the carrier, when liable for the loss shall have the full benefit of any insurance that may have been effected upon the goods, this provision is valid, as between the carrier and the shipper; and that, therefore, such provision limits the right of subrogation of the insurer, upon paying the shipper the loss to recover over against the carrier. Phoenix Ins. Co. v. Erie & W. Transp. Co. 117 U. S. 312 (29:873); St. Louis I. M. & S. R. Co. v. Commercial U. Ins. Co., 139 U. S. 223 (35:154).

> "If a valid claim by the underwriter to be subrogated to the rights of the owner will not arise where the carrier has contracted with the owner that he, the carrier, shall have the benefit of any insurance, it would seem to be clear that where the carrier is actually and in terms the party insured, the underwriter can have no right to recover against the carrier, even if the amount of the policy has been paid by the insurance company to the owner on the order of the carrier."

Wager v. Providence Ins. Co., 150 U. S. 100 (37 L. Ed. 1017).

Approved in *Willock v. Penn. R. Co.,* 166 Pa. St. 191; 30 Atl. 949.

"The question of the subrogation of the libelant to the rights of the shippers against the carrier presents no serious difficulty.***"

"In the present case, the libelant, before the filing of the libel, paid to each of the shippers the greater part of his insurance, and thereby became entitled to recover so much, at least, from the carrier.***"

"The appellant does, however, object that the decree should not include the amount of the loss on the cotton shipped under through bills of lading from Nashville to Liverpool. This objection is grounded on a clause in those bills of lading, which is not found in the bill of lading of the bacon and hams shipped at New York; and on the adjudication in Phoenix Ins. Co. v. Erie & W. Transp. Co. 117 U. S. 312 (29:873), that a stipulation in a bill of lading, that a carrier, when liable for a loss of the goods, shall have the benefit of any insurance that may have been effected upon them, is valid as between the carrier and the shipper, and therefore limits the right of an insurer of the goods, upon paying to the shipper the amount of a loss by stranding, occasioned by the negligence of the carrier's servants, to recover over against the carrier."

Liverpool and G. W. Steam Co. v. Phoenix Ins. Co., 129 U. S. 397 (32 L. Ed. 799).

"In fire insurance, as in marine insurance, the insurer, upon paying to the assured the amount of a loss of the property insured, is doubtless sub-

rogated in a corresponding amount to the assured's right of action against any other person responsible for the loss. But the right of the insurer against such other person does not rest upon any relation of contract or of privity between them. It arises out of the nature of the contract of insurance as a contract of indemnity, and is derived from the assured alone, and can be enforced in his right only. By the strict rules of the common law, it must be asserted in the name of the assured; in a court of equity or of admiralty, or under some state codes, it may be asserted by the insurer in his own name; but in any form of remedy the insurer can take nothing by subrogation but the rights of the assured; and if the assured has no right of action, none passes to the insurer."

> *St. Louis I. M. & S. R. Co. v. Commercial Union Ins. Co.,* 139 U. S. 223 (35 L. Ed. 154).

"The right of action against another person, the equitable interest in which passes to the insurer, being only that which the assured has, it follows that if the assured has no such right of action, none passes to the insurer; and that if the assured's right of action is limited or restricted by lawful contract between him and the person sought to be made responsible for the loss, a suit by the insurer, in the right of the assured, is subject to like limitations or restrictions."

> *Phoenix Ins. Co. v. Erie & West. Transp. Co.,* 117 U. S. 312, (29 L. Ed. 873).

This seems to be such well-settled law that we can find no late decisions in the Supreme Court of

the United States upon the subject. But the Circuit Court of Appeals in the First Circuit, in the case of M. & M. Transportation Co. v. Robinson-Baxter-Dissosway T. & T. Co., 191 Fed., at p. 773, decided November 29, 1911, says:

> "The only point decided there was that, where a bill of lading provided that the carrier should have the benefit of any insurance, this excludes the right of the insurer to subrogation against the carrier, and also that, when the carrier is actually the party insured, the underwriters have no right to recover against him. These are well-settled principles of law, although facts like those which occurred in that case have raised some confusion as to the question whether or not the underwriters are liable to the carrier where the bill of lading contains provisions such as we have stated. We regard it, however, as now settled that, unless the underwriter reserves in its policy a positive right as against such a provision, the underwriter can claim to be subrogated to only such rights as the owner of the cargo or carrier may have, and his right to subrogation is limited accordingly."

Counsel for appellant objects to the reasoning by which the Trial Court arrived at its conclusions; but be that as it may, it is immaterial if the Trial Court's judgment was correct. The Supreme Court of the State of Washington has said:

> "The question before us is not whether the lower court arrived at a correct conclusion by an incorrect process of reasoning, but whether

considering all the evidence its decision was the proper one to be entered."

Kane v. Dawson, 52 Uash. 413.

In the printed opinion of the Trial Court there also occurs this statement:

"Under the law controlling in this case the insured could have maintained an action against the respondent to recover the advance made. St. Louis etc. Ry. v. Commer. Ins. Co., 139 U. S. 233."

Upon examining the St. Louis case, we find JUDGE GRAY says.

"In fire insurance, as in marine insurance, the insurer, upon paying to the assured the amount of a loss of the property insured, is doubtless subrogated in a corresponding amount to the assured's right of action against any other person responsible for the loss. But the right of the insurer against such other person does not rest upon any relation of contract or privity between them. It arises out of the nature of the contract of insurance as a contract of indemity, and is derived from the assured alone, and can be enforced in his right only. By the strict rules of the common law, it must be asserted in the name of the assured; in a court of equity or of admiralty, or under some state codes, it may be asserted by the insurer in his own name; but in any form of remedy the insurer can take nothing by subrogation but the rights of the assured; and if the assured has no right of action none passes to the insurer."

the United States upon the subject. But the Circuit Court of Appeals in the First Circuit, in the case of M. & M. Transportation Co. v. Robinson-Baxter-Dissosway T. & T. Co., 191 Fed., at p. 773, decided November 29, 1911, says:

> "The only point decided there was that, where a bill of lading provided that the carrier should have the benefit of any insurance, this excludes the right of the insurer to subrogation against the carrier, and also that, when the carrier is actually the party insured, the underwriters have no right to recover against him. These are well-settled principles of law, although facts like those which occurred in that case have raised some confusion as to the question whether or not the underwriters are liable to the carrier where the bill of lading contains provisions such as we have stated. We regard it, however, as now settled that, unless the underwriter reserves in its policy a positive right as against such a provision, the underwriter can claim to be subrogated to only such rights as the owner of the cargo or carrier may have, and his right to subrogation is limited accordingly."

Counsel for appellant objects to the reasoning by which the Trial Court arrived at its conclusions; but be that as it may, it is immaterial if the Trial Court's judgment was correct. The Supreme Court of the State of Washington has said:

> "The question before us is not whether the lower court arrived at a correct conclusion by an incorrect process of reasoning, but whether

considering all the evidence its decision was the proper one to be entered."

Kane v. Dawson, 52 Uash. 413.

In the printed opinion of the Trial Court there also occurs this statement:

"Under the law controlling in this case the insured could have maintained an action against the respondent to recover the advance made. St. Louis etc. Ry. v. Commer. Ins. Co., 139 U. S. 233."

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"In fire insurance, as in marine insurance, the insurer, upon paying to the assured the amount of a loss of the property insured, is doubtless subrogated in a corresponding amount to the assured's right of action against any other person responsible for the loss. But the right of the insurer against such other person does not rest upon any relation of contract or privity between them. It arises out of the nature of the contract of insurance as a contract of indemity, and is derived from the assured alone, and can be enforced in his right only. By the strict rules of the common law, it must be asserted in the name of the assured; in a court of equity or of admiralty, or under some state codes, it may be asserted by the insurer in his own name; but in any form of remedy the insurer can take nothing by subrogation but the rights of the assured; and if the assured has no right of action none passes to the insurer."

We conclude, therefore, there must be some misprint in the learned Trial Judge's opinion.

We respectfully ask that the decree of the Trial Court be affirmed and that we also recover our costs in this court.

CLISE & POE,
Proctors for Respondent.

Dated: Seattle, Washington,
October 11th, 1915.